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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNITED STATES OF AMERICA,

Respondent,

v.

GLENN MOORE HAWKINS
and
MELVIN WILLIAMS,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the period of delay caused by the government's appeal of an order releasing Petitioner Hawkins on bail should be excludable time under the Speedy Trial Act?

II. Whether evidence should be suppressed where the magistrate issuing a search and seizure warrant was not informed by the government affiants that the informant had failed a polygraph examination as to material questions?

III. Whether polygraph evidence may be admissible when it is offered solely for the purpose of impeaching a witness' veracity and reliability as opposed to the ultimate issue of guilt or innocence?

IV. Whether evidence seized pursuant to a search and seizure warrant issued six months after the alleged criminal conduct qualifies as relevant and admissible evidence?

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OPINION OF THE COURT BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit is reported at 788 F.2d 200 (4th Cir. 1986) and is set forth verbatim in the Appendix ("Appx.") at 1-19.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was filed April 7, 1986. The court denied Petitioners' for Rehearing on May 16, 1986. (Appx. at 20-21.)

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Sup. Ct. R. 17.1(a) and (c).

STATUTES

18 U.S.C. §3161(h)(1)(E)(J)

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
>
> (E) delay resulting from any interlocutory appeal;
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

18 U.S.C. §3145(c)

> --An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

28 U.S.C. §1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1292

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the Canal Zone, the District Court of

> Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; ...

18 U.S.C. §3162(a)(2)

> (2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

RULES

Fed R. Evid. 401

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed R. Evid. 402

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 403

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Walter Robinson is a long time supplier of narcotics who was released from Federal Prison in 1983. Immediately upon his

release, Robinson sought to obtain and distribute large quantities of narcotics. Robinson contacted David Mosteller, an individual with whom he had been incarcerated, and agreed to obtain cocaine through Mosteller's sources. One of those sources turned out to be Drug Enforcement Administration undercover special agent Callahan. Robinson agreed with Mosteller and his source to travel from Maryland to Northern Virginia in June 1984 to procure the cocaine. Since Robinson had no driver's license, he enlisted the aid of two individuals, Stan (last name unknown) and Glenn Hawkins, one of the Petitioners, to drive him to Virginia. Stan drove Robinson on the first trip to Virginia; Hawkins drove Robinson on the second. On that second trip, Hawkins drove Robinson from a Sheraton Hotel to a Holiday Inn to obtain the cocaine. Hawkins remained outside the hotel when Robinson entered to

purchase narcotics from Mosteller's source. Minutes later, Robinson was arrested in the hotel and Hawkins was arrested in the parking lot.

At the time of his arrest, Robinson told Federal agents that the person driving the car, Petitioner Hawkins, was not aware of the illicit activity and admitted he was the only person involved in the cocaine acquisition. While in jail, Robinson, through his common law wife, asked Hawkins and Petitioner Melvin Williams to help him raise bail and hire an attorney. When Hawkins and Williams refused, Robinson contacted the prosecutors and sought to negotiate a favorable plea bargain in return for providing testimony against Petitioners.

Robinson now explained that he had received funds for the Northern Virginia purchase from Petitioner Williams. Robinson also recanted his statements

exculpating Hawkins. At trial Robinson testified that he met with Williams to discuss the deal at the Underground, Williams' night club. Robinson testified that he saw Hawkins at the club, but Hawkins was not present during the discussions. Robinson said that he next met Williams at Williams' residence. He was driven there by Hawkins who left to purchase an air conditioner. Robinson related that Williams handed him a briefcase containing the $100,000 that he ultimately presented to Mosteller's source for the cocaine.

As part of the plea agreement negotiations, informant Walter Robinson agreed to take a polygraph examination to ascertain his credibility and veracity. Robinson was asked, among other questions, "Did Melvin Williams tell you he would finance the cocaine deal?" and "Did Melvin Williams give the money to Glenn Hawkins

to pay for this cocaine?" Both questions were answered affirmatively. The special agent who administered the examination concluded that these answers were "deceptive." In any event, based on his knowledge of other evidence, the special agent opined that Robinson's "deceptiveness" did not indicate that "Melvin Williams did not give Robinson $100,000 in full expectation of participating in a cocaine deal, or that Glenn Hawkins was not the recipient of this money." The Government moved for an order that no references to the results of the polygraph examination be made during the trial. Over Petitioners' strong objections, the motion in limine was granted.

At trial, the Government introduced into evidence numerous items seized from the residence of Petitioner Williams which were obtained pursuant to a search and seizure warrant executed six months after

the alleged criminal conduct. Petitioners moved to suppress this evidence because certain information dealing with the unreliability of the informant was not included in the affidavit for the Magistrate's consideration.

Petitioners also filed a motion to suppress evidence seized from Petitioners in December 1984, nearly six months after the June 1984 crime charged in the Indictment. Admitted against Petitioner Hawkins were $5,000 in cash and an electronic beeping device. Admitted against Petitioner Williams were $30,000, two guns, and an anti-electronic bugging device. This evidence was seized from a search of the respective Petitioners' residences. This motion was denied.

At the conclusion of a three-day jury trial before United States District Judge Richard L. Williams, Petitioner Hawkins was convicted of attempting to possess

cocaine with the intent to distribute and traveling in interstate commerce to promote an unlawful activity. Petitioner Williams was convicted of attempting to possess cocaine with intent to distribute, causing others, and aiding and abetting others, to travel in interstate commerce to promote an unlawful activity, and using a telephone in facilitating the attempted possession of cocaine with intent to distribute. Petitioners were sentenced to maximum periods of incarceration and special parole terms.

On appeal, the United States Court of Appeals for the Fourth Circuit vacated the special parole terms and affirmed in all other respects.

ARGUMENTS

I. **THE PERIOD OF DELAY CAUSED BY THE GOVERNMENT'S APPEAL OF AN ORDER RELEASING PETITIONER HAWKINS ON BAIL SHOULD NOT BE EXCLUDABLE TIME UNDER THE SPEEDY TRIAL ACT.**

Prior to trial, Petitioner Hawkins asserted that the Government sought to bring him to trial outside the time limits of the Speedy Trial Act, 18 U.S.C. §3161 et seq. At issue was the excludability vel non of time devoted to the Government's appeal of an adverse pre-trial detention order. Hawkins argued that appeals from pre-trial detention orders were limited to determining whether the defendant shall be detained or released prior to trial and, therefore, had no impact or delay on the date trial commenced. In Hawkins' view, time expended on the detention-related appeal was to be included in the speedy trial computation. Under this theory, Hawkins would have been brought to trial more than 70 days after the filing of the indictment and in violation of the Speedy Trial Act.

The district court denied Petitioner Hawkins' motion. The court of appeals

held that such time was excludable time under 18 U.S.C. §3161(h)(1)(E) (delay resulting from an interlocutory appeal) and 18 U.S.C. §3161(h)(1)(J) (delay attributable to proceeding concerning the defendant under advisement by the Court). Therefore, in the views of the lower courts, Hawkins was brought to trial within the dictates of the Speedy Trial Act.

The Government appealed the adverse bail release order under 18 U.S.C. §3145(c), a newly enacted provision of the Comprehensive Crime Control Act of 1984. Such appeals are expressly governed by 28 U.S.C. §1291. 28 U.S.C. §1291 discusses appeals of a final decision of a district court whereas 28 U.S.C. §1292 controls interlocutory appeals. Thus, Congress has expressly stated that appeals from release or detention orders are appeals from a final decision and are not interlocutory

in nature. Accordingly, the Fourth Circuit's reliance upon the interlocutory appeal subpart of 18 U.S.C. §3161(h)(1) is clearly erroneous.

Similarly, the period of time spent on the government's appeal of the release order was not excludable time under 18 U.S.C. §3161(h)(1)(J) as a proceeding concerning Petitioner Hawkins insofar as the merits of the case. Manifestly, days spent on appeals of detention issues are irrelevant to speedy trial consideration for whether a defendant is retained or released has no bearing on a trial date. In either instance, the trial date remains unaltered. Thus, the Fourth Circuit erred by failing to include the time spent on the release appeal in the speedy trial calculations.

Inasmuch as Petitioner Hawkins was brought to trial outside the parameters of the Speedy Trial Act, the court of appeals

erred by not reversing the conviction and remanding the matter to dismiss the indictment. 18 U.S.C. §3162(a)(2).

II. EVIDENCE SHOULD BE SUPPRESSED WHERE THE MAGISTRATE ISSUING A SEARCH AND SEIZURE WARRANT WAS NOT INFORMED BY THE GOVERNMENT AFFIANTS THAT THE INFORMANT HAD FAILED A POLYGRAPH EXAMINATION AS TO MATERIAL QUESTIONS.

The Government sought a warrant to search and seize evidence from the home of Petitioner Williams. The request for a warrant, made six months after the June 1984 crime charged in the indictment, was accompanied by affidavits which, among other things, included information provided by informant Walter Robinson. The Government did not, however, inform the magistrate that Robinson had failed a lie detector test as to Petitioners' role in the narcotics transaction.

The court of appeals sidestepped the government's omission by observing that "[t]he magistrate knew that there was some

question about Walter Robinson's veracity because he was aware that Robinson was named as a defendant in the original indictment, denied any involvement in the offense, and later entered into an agreement with the government and admitted his participation in the crime." (Appx. at 17.)

By responding in this fashion to the dubious conduct of the Government's law enforcement officials, the intermediate federal appellate court appears to countenance the purposeful withholding of information from the magistrate. Such a policy tends to relegate the magistrate to the role of a rubber stamp and encourages the Government to withhold possibly damaging information from the warrant affidavit. Moreover, the fact that the magistrate may have been aware of Robinson's plea arrangement did not notify that judicial offer that Robinson had flunked a

polygraph examination relating to key portions of his testimony.

In Illinois v. Gates, 462 U.S. 213 (1983), this Court held that probable cause must be determined upon a review of the totality of the circumstances. Fundamentally, to review the totality of the circumstances, the magistrate must be made aware of all the circumstances. By purposely providing only those facts which were helpful to the prosecution and deleting those which are detrimental to its position, the Government frustrated the intent of Gates.

Unequivocally, despite other surveillance efforts, Walter Robinson's statements provided the bedrock for finding probable cause to issue the search and seizure warrant. Discounting his statements, or reviewing the remaining facts stated in the affidavit and considering Robinson's information in a considerably diminished

capacity, the remaining information does not rise to the level of probable cause for the magistrate to believe that Petitioner Williams committed, was committing, or was going to commit an offense. Brinegar v. United States, 338 U.S. 102 (1965). Hence, the warrant should not have been issued and the admission of the fruits of that search was in error.

III. POLYGRAPH EVIDENCE SHOULD BE ADMITTED WHERE IT IS OFFERED SOLELY FOR THE PURPOSE OF IMPEACHING A WITNESS' VERACITY AND RELIABILITY AS OPPOSED TO THE ULTIMATE ISSUE OF GUILT OR INNOCENCE.

Petitioners were precluded at trial from impeaching Robinson's testimony based on the deceptive answers provided during his polygraph examination. The Fourth Circuit failed to address this contention in its published opinion.

Petitioners acknowledge that the admissibility of polygraph evidence is

within the discretion of the trial court, see, e.g., United States v. Webster, 639 F.2d 174, 186 (4th Cir.), cert. denied, 454 U.S. 857 (1981), and that such evidence is generally excluded because of the reluctance to interfere with the jury's determination of a witness' credibility. Kaplan, The Lie Detector: An Analysis of Its Place in the Law of Evidence, 10 Wayne L. Rev. 381 (1961). Nevertheless, polygraph evidence should be ruled admissible where it is offered solely for the purpose of establishing or impeaching a witness' veracity and reliability rather than on the ultimate issue of guilt or innocence.

So held the court in United States v. Hart, 344 F.Supp. 522 (E.D.N.Y. 1971), where the government's principal witness blurted out during cross-examination that he had taken a lie detector test. The tests, requested by the government

indicated the witness had been untruthful, and that the prosecution was aware of the results before putting him on the witness stand. A mistrial was declared and the court determined that this evidence would be admissible at the retrial.

> Having requested that [the witness] submit to polygraph tests, and then rejected the conclusions of the tests, the government should be prepared to show (a) the prior experience with polygraph tests and with the particular testers which led the Bureau of Narcotics and Dangerous Drugs to have [the witness] submit to the tests; (b) the basis for the subsequent doubts about the validity of polygraph tests which led to the disregard of the results; and (c) any other relevant material concerning the tests which defendants may request from the government on their own behalf.
>
> The bearing of the lie detector test of [the witness'] credibility should be determined by the jury and not by a prior court hearing.

Id. at 524 (emphasis supplied). The Hart

rationale has been found to be "convincing," United States v. Whitt, 718 F.2d 1494, 1501-02 at n.8 (10th Cir. 1983), and has been cited with approval in United States v. Grant, 473 F.Supp. 720, 725 (D.S.C. 1979). Likewise, polygraph results were permitted for purposes of witness impeachment and rehabilitation in United States v. Estrada-Lucas, 651 F.2d 1261 (9th Cir. 1980).

Petitioners do not suggest, and did not below, that polygraph evidence should always be admissible. Instead, Petitioners submit that such evidence, to the extent that it relates to the credibility of a witness, should be admissible to assist the fact finder's assessment of a witness. This is particularly true where, as here, the polygraph is administered as part of a plea arrangement. What could be more relevant than the fact that answers provided by the Government's key witness

had been deemed "deceptive" by the Government's own polygraph examiner? Instead of dismissing those results as a consequence of the special agent's presumed knowledge of other corroborating evidence, the Government, as in Hart, should have been compelled to have the examiner explain his doubts as to the results and let the jury determine what emphasis should be placed on the polygraph tests and Robinson's testimony. An instruction limiting the jury's consideration to the credibility of the witness and not the culpability of the defendants would assure the proper use of this polygraph results.

IV. EVIDENCE SEIZED SIX MONTHS AFTER THE ALLEGED CRIMINAL CONDUCT IS NOT RELEVANT OR ADMISSIBLE EVIDENCE.

Petitioners sought to suppress certain evidence seized in December 1984 maintaining that such evidence bore no relevance to and were not probative of the alleged

criminal conduct occurring in June 1984. While the panel hearing this appeal focused the majority of oral argument on this issue, the Fourth Circuit's opinion does not discuss this point.

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Implicit in that definition are two distinct requirements: (1) The evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action. 1 Weinstein's Evidence §185 at 435 (2d. ed); 22 Wright & Graham, Federal Practice and Procedure: Evidence §5162 at 18 (1978).

Evidence which is not relevant is not

admissible. Fed. R. Evid. 402. Fed. R. Evid. 403 precludes the admissibility of evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." The trial judge is vested with broad discretion in ruling on relevancy and in balancing the probative value of relevant evidence versus any undue prejudice. United States v. McDonald, 688 F.2d 224, 227-28 (4th Cir. 1981), cert. denied, 459 U.S. 1103 (1983). A lower court's ruling on this issue will be reversed upon a finding of abuse of discretion. Id. at 228.

Succinctly stated, the fact that Petitioners possessed large sums of cash, an electronic beeping device, weapons and an anti-electronic bugging device in

Baltimore in December 1984 does not prove or tend to prove Petitioners' culpability for events occurring in Northern Virginia in June 1984. Therefore, the offered evidence was irrelevant and its admission was an abuse of discretion.

Even assuming arguendo that the challenged evidence was relevant, its probative value to the prosecution was outweighed by the prejudice caused to Petitioners. Undoubtedly, the possession of guns, money, and electronic equipment had a prejudicial impact on the jury's evaluation of Petitioners' purported conduct in June 1984. While certain courts, in balancing probity against prejudice, have permitted the admission of weapons and money, in each of those cases the weapons and cash were seized at the time of arrest or execution of warrant and at the place where narcotics were stored. See, e.g., United States v. Bernal, 719

F.2d 1475, 1478 (9th Cir. 1983); United States v. Arnott, 704 F.2d 322, 325-26 (6th Cir. 1983); United States v. Terry, 702 F.2d 299, 318 (2d Cir.), cert. denied, 461 U.S. 931 (1983); United States v. De La Torre, 639 F.2d 245, 249-50 (5th Cir. 1981); United States v. Pickelsimer, 585 F.2d 1199, 1204 (3d Cir. 1978); United States v. Miroyan, 577 F.2d 489, 494-95 (9th Cir. 1978). No case goes so far as to state that probity outweighs prejudice where the prosecution seeks to introduce guns, money and electronic equipment seized six months after and a hundred miles away from the narcotics activity. Because the probity of this evidence paled in comparison to the prejudice to Petitioners, F.R. Evid. 403 precluded its admission. The district court's admission of this prejudicial evidence for the jury's consideration deprived Petitioners of a fair trial and mandates the reversal

of their convictions.

CONCLUSION

For the aforegoing reasons, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit and that its decision be reversed.

Respectfully submitted,

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